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No. 91-1360

In The

Supreme Court of the United States

October Term, 1991

GERALD R. BENNETT, Individually and as Mayor of Palos Hills, and DANIEL HURLEY, Individually and as then former Police Chief of Palos Hills,

Petitioners,

vs.

CHARLES HANSEN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1) Whether petitioner Bennett, at the time of his misconduct, was acting as a legislator and, is thereby entitled to absolute immunity?

2) Should this Court consider the issue of whether, even if petitioner Bennett is not entitled to legislative immunity, petitioner Bennett is entitled to such immunity when this issue was neither presented nor considered by the lower courts?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

JURISDICTION 1

STATEMENT OF THE CASE 1

ARGUMENTS 5

I.

THIS PETITION SHOULD BE GRANTED ONLY IF THIS COURT WISHES TO OVERRULE *FORRESTER v. WHITE* 5

II.

THIS COURT SHOULD DENY THE PETITION WHERE A PARTY HAS NOT PROPERLY PRESENTED THE ISSUE ON APPEAL 8

CONCLUSION 9

TABLE OF AUTHORITIES

Page

CASES:

Forrester v. White, 484 U.S. 219 (1988) 5, 7

Hansen v. Bennett, 948 F.2d 397 (7th Cir. 1991)... 6, 7, 8

Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391 (1979) 5

Supreme Court of Virginia v. Consumers Union, 446 U.S. 719 (1980) 5

United States v. Brewster, 408 U.S. 501 (1972) 5

Youakim v. Miller, 425 U.S. 231 (1976) 8

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JURISDICTION

The jurisdictional requisites are adequately set forth in the petition. However, as treated and discussed more fully by the argument below, respondent does not believe petitioners have shown any reason for this Court to exercise its sound judicial discretion to grant the petition.

STATEMENT OF THE CASE

The respondent, Charles Hansen, is a 56 year old male who has resided in Palos Hills, Illinois for 15 years.

Since early childhood he has had limited vision in his left eye. As a result of an industrial accident prior to the complained-of occurrence, Mr. Hansen also lost all the fingers of his left hand.

Petitioner Gerald Bennett, the mayor of Palos Hills, has admitted that he dislikes Mr. Hansen. Prior to the occurrence, the mayor publicly stated that Mr. Hansen was a Bennett adversary, that Hansen was a negative influence in the community, and that Hansen was prohibiting Bennett's administration from accomplishing "positive" things in the City of Palos Hills. Bennett stated that Mr. Hansen did not know what he was talking about, that he, Bennett, was tired of Mr. Hansen, and that he, Bennett, wished that Mr. Hansen did not live in Palos Hills. Mr. Hansen ran unsuccessfully for the position of mayor against Mr. Bennett.

The City of Palos Hills has a mayoral form of government established under the laws of Illinois. This form of government consists of the mayor and the city council. The city council includes the mayor and ten aldermen. The mayor presides over the meetings of the city council and votes in the event of a tie, or if a vote requires greater than a majority. City council meetings in Palos Hills are held on the first and third Thursdays of every month.

In 1987, Mr. Hansen became concerned that toxic waste was buried on a proposed park site known as Stony Creek Park West. During October, 1987, Mr. Hansen obtained signatures on a petition from citizens of Palos Hills seeking their commitment to attend a council meeting on October 29, 1987 to discuss the Stony Creek Park West issue. When Mr. Hansen learned that there was

no council meeting scheduled on the 29th, he urged citizens to attend the next regularly scheduled meeting on November 5, 1987.

The Palos Hills city council meeting consists of discrete portions. The first portion is the "citizen's petitions" segment. In order to speak during the "citizen's petitions" segment, a citizen has to make a written request to do so 24 hours prior to the council meeting. Immediately following that portion is the "citizen hearing" section. During the "citizen hearing" portion, any citizen was allowed to speak on any issue, including issues not on the agenda, as long as the individual was recognized by the chair.

On November 4, 1987, Mr. Hansen submitted a written request to the City Clerk that he be allowed to speak during the "citizen's petitions" portion of the council meeting. On November 5, the meeting was called to order and after the pledge of allegiance, the "citizen's petitions" segment began. The individual who preceded Mr. Hansen during this portion was not informed of any time or content restrictions. After that individual concluded her statement, Mr. Hansen was recognized and told by the mayor that he had three minutes to speak. Mr. Hansen requested that he be granted additional time to speak. This was denied. The mayor did not consider the time spent considering Hansen's request for additional time as part of the time allotted to Hansen. Hansen began speaking on the Stony Creek Park issue. Mr. Hansen was interrupted by the mayor and told that time was up just when Mr. Hansen stated he would read a letter on the issue from the "Federal Super-Fund Program," which he had previously forwarded to the city council. Mr. Hansen was not permitted to speak for even his allotted three

minutes before the council. A number of citizens objected to Hansen's being silenced before he could reveal the contents of the letter. Immediately after Mr. Hansen was not permitted to speak for his three minutes, an alderman stated to the group that the only thing toxic in Palos Hills was Mr. Hansen's statements.

The meeting proceeded to the "citizen hearing" portion. The City Clerk announced: "the meeting is now open to the general public." An individual who speaks during the "citizen petition" portion is also permitted to speak during the open to general public portion of the meeting. The "citizen hearing" section of the meeting has continued, on occasion, for as long as an hour and a half. The meeting on November 5, 1987, was a general meeting; no restrictions as to content of the issues addressed were ever placed on the "citizen hearing" section of the meeting.

During the "citizen hearing" portion of the meeting, several citizens brought up the issue of Stony Creek. The request was made to have the letter read from the federal agency. Many people spoke out of order during the meeting. Mr. Hansen sought to be recognized by the mayor, but the mayor refused to do so and stated Mr. Hansen was out of order. The mayor then directed the chief of police, petitioner Daniel Hurley, to summarily remove Mr. Hansen from the council chamber. Before Hurley even approached, Mr. Hansen was walking out of the chambers. Hurley grabbed Mr. Hansen, restricted Hansen's ability to move, and pushed him out of the chambers. Hurley told Hansen that he, Hurley, should have killed him when he had the chance, or will kill him if he gets a chance. Then Hurley and other police officers slammed Mr. Hansen into a wall, kicked and beat him,

picked him up, rammed him through a set of doors and threw him onto the pavement and once again kicked him. No charges were ever lodged against Mr. Hansen.

As a result of the beating, Mr. Hansen suffered and continues to suffer serious and permanent injuries.

ARGUMENT

I. THIS PETITION SHOULD BE GRANTED ONLY IF THIS COURT WISHES TO OVERRULE *FORRESTER v. WHITE.*

The Seventh Circuit's unanimous opinion clearly followed and applied the standards prescribed by this Court in passing on the issue of absolute legislative immunity. The Seventh Circuit recognized that this Court has held that legislative immunity does not prohibit inquiry into activities that are casually or incidentally related to legislative affairs but not a part of the legislative process. *United States v. Brewster*, 408 U.S. 501, 528 (1972).[1] Additionally, in determining whether an individual is entitled to absolute immunity, a court must look to the function the individual was performing at the time the incident in question occurred. *Forrester v. White*, 484 U.S. 219, 224 (1988). Applying those standards the Seventh Circuit

[1] It is not disputed that members of legislative bodies, whether state, local or regional, have absolute immunity from suit based on their acts undertaken as part of the legislative function. *See Supreme Court of Virginia v. Consumers Union*, 446 U.S. 719, 731-33 (1980); *Lake Country Estates v. Tahoe Regional Planning Agency*, 440 U.S. 391, 405 (1979).

noted that the Palos Hills city counsel meeting had quite discrete portions. The meeting contained elements of a "town meeting" as well as elements of a legislative session. The portion of the meeting during which Mr. Hansen was seized and ejected, the citizen's hearing, was akin to a "town meeting." *Hansen v. Bennett*, 948 F.2d 397, 402 (7th Cir. 1991). Because the removal took place during this section of the meeting, the function the mayor was performing at that time was not that of a legislator and, therefore, the mayor was not entitled to absolute immunity. *Id.* at 403. The opinion of the Seventh Circuit is straight-forward, logical and a proper application of apt case law. As a result, the petitioners cannot cite one case, either from this Court or from a federal appellate court that is at odds with the opinion.

It is important to note that the petition is silent as to the Seventh Circuit's determination that there were distinct portions to the council meeting and the fact that Mr. Hansen was ejected during the "town meeting" stage. The reason for this silence is obvious. While the petitioners give lip service to the functional approach required by *Forrester*, they do not want it applied in this case. It is apparent, even to them, that at the time Bennett ejected Mr. Hansen, the mayor was doing nothing more than presiding over a town meeting. Consequently, the petitioners are required to argue that the mayor should be entitled to blanket immunity not because he was acting as a legislator at the time but, rather, because he could attain that status at some latter stage of the meeting. The petitioners state the removal of Mr. Hansen was done "to ensure the continuation of the legislative process." (Petition at 10). This "continuation" or *per se* theory

of legislative immunity for all actions taken at a council meeting was flatly rejected by the Seventh Circuit because it is totally at odds with the functional approach required by *Forrester*. "[I]mmunity is justified and defined by the *functions* it protects and serves, not the person to whom it attaches." *Forrester*, 484 U.S. at 227 (original emphasis). These petitioners are asking this Court to grant certiorari not because the Seventh Circuit failed to follow precedent but, rather, because that court did follow it.

The petitioners are effectively requesting that *Forrester* be overruled. They justify such drastic action by claiming, without any substantiation, that the Seventh Circuit's decision has "caused widespread concern and confusion among the local legislators." (Petition at 13) This "concern and confusion" are causing endless legislative meetings to take place in Illinois, Indiana and Wisconsin because meeting chairmen, fearful of lawsuits, are permitting individuals to speak incessantly. (Petition at 10) The claim is totally unfounded and ridiculous. Filibusters are not taking place. Anarchy does not reign in this circuit. Meetings are being held and legislation is being considered as usual – life goes on. Notwithstanding the petitioners' rhetoric, Judge Eschbach's closing sentences properly sum up this case:

> In this case, we cannot see how Bennett's independence as a legislator – his ability to vote and speak freely on legislative matters – is implicated. What is implicated is Bennett's discretion to govern public speech. This exercise of discretion is better protected by qualified immunity.

Hansen, 948 F.2d at 404. The petition should be denied.

II. THIS COURT SHOULD DENY THE PETITION WHERE A PARTY HAS NOT PROPERLY PRESENTED THE ISSUE ON APPEAL.

The second issue presented by the petitioners addresses the issue of whether petitioner Police Chief Hurley, who purported to have been the sergeant-at-arms at the council meeting, would be entitled to legislative immunity even if the mayor was not. As noted in the circuit court's opinion, this issue was not considered by the district court and was not presented on appeal before that court. *Hansen*, 948 F.2d at 398 n.2. Additionally, the petitioners never sought rehearing before the Seventh Circuit. There is nothing exceptional in this case which requires this Court to pass upon an issue not raised or resolved by the lower court. *Youakim v. Miller*, 425 U.S. 231, 234-35 (1976). The writ should be denied, the petitioners have failed to properly present this issue before the lower courts.

Finally, the petitioners fail to explain how one is entitled to legislative immunity by executing an order of an individual who is not a legislator.

CONCLUSION

For the above reasons respondent, Charles Hansen, respectfully requests that the petition for writ of certiorari be denied.

April 10, 1992

Respectfully submitted,

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